

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 23, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3366-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD M. VALES,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. A jury found Ronald M. Vales guilty of armed robbery while concealing his identity, contrary to §§ 943.32(1) and (2) and 939.641, STATS. Vales filed a postconviction motion challenging the effectiveness of his trial counsel. The court denied his motion without a hearing. Vales appeals from both the judgment of conviction and the postconviction order. We affirm.

On October 7, 1993, two men robbed the Municipal Credit Union in Beloit. On October 30, 1993, Desiree Henry informed police that Vales and Ernest King had told her that they had robbed the credit union. On November 9, Henry gave a written statement implicating the two men. She also spoke with the detectives on November 11 and gave additional statements incriminating Vales and King. Henry had been Vales's girlfriend for several years. She told police that she called them because she was angry with Vales.

Separate preliminary hearings were held for Vales and King. Henry first testified at King's preliminary hearing and reiterated many of the statements that she had given to the police. At Vales's preliminary hearing, however, she recanted her accusations against both men.

Vales and King were tried together. At trial, Henry denied telling the police that Vales and King had robbed the credit union. She claimed that she had told police that the men "robbed drug dealers." Henry claimed that the police had fabricated her statements linking the men to the credit union robbery. Henry testified that she learned the details of the robbery from newspaper articles, and not from Vales. However, she admitted that she received \$1000 from the "Crimestoppers" program.

After Henry testified that she had not implicated Vales and King in the credit union robbery, the State introduced her statements to the police as prior inconsistent statements of a testifying witness under § 908.01(4)(a)1, STATS. Other witnesses offered testimony that corroborated several aspects of Henry's statements to the police.

Vales challenges the effectiveness of his trial counsel. In his postconviction motion, Vales asserted that counsel should have moved to suppress Henry's prior statements. Vales also asserted that counsel should have done more to persuade the jury that Henry had lied in her initial statements to the police. Vales specifically faulted counsel for not introducing evidence of a private investigator's interview with Henry. In that interview, Henry said she was mad at Vales so she told the police that he and King robbed the credit union and that she had read about the robbery in the newspaper. Henry also admitted receiving money for her information.

The trial court denied Vales's postconviction motion without a hearing. In order to warrant an evidentiary hearing on a postconviction motion, counsel must allege facts which, if true, warrant the relief sought. See *State v. Bentley*, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). If the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its discretion deny the motion without a hearing. See *State v. Washington*, 176 Wis.2d 205, 215, 500 N.W.2d 331, 336 (Ct. App. 1993).

Wisconsin uses the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984), to review claims of ineffective assistance of counsel. The first prong requires that the defendant show that counsel's performance was deficient. See *State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). The second prong requires a showing that the deficient performance was prejudicial. See *id.* If the defendant is unable to show one prong, the court need not address the other. See *Strickland*, 466 U.S. at 697.

Deficient performance means that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). In determining whether there was deficient performance, we make every effort to avoid relying on hindsight. See *id.* We focus on counsel's perspective at the time of trial, and the defendant has the burden to overcome a strong presumption that counsel acted reasonably within professional norms. An attorney's performance is not deficient unless it is shown that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *State v. Guck*, 170 Wis.2d 661, 669, 490 N.W.2d 34, 38 (Ct. App. 1992).

The performance of Vales's trial counsel was not deficient. Counsel cannot be faulted for not objecting to the admissibility of Henry's statements to the police. The statements were admissible as prior inconsistent statements of a witness. Section 908.01(4)(a)1, STATS. Any objection would have been denied.

In addition to Henry's trial testimony, the jury heard evidence of her statements to the police and of her contradictory testimony at the two

preliminary hearings. Although the private investigator's report was not introduced, the jury heard evidence that Henry had read about the robbery in the newspaper, that she had been mad at Vales when she talked with police, and that she received money from Crimestoppers. The substance of the report was before the jury. Vales's trial counsel challenged the credibility of Henry's initial statements to the police at every opportunity. His performance in that regard was not deficient.

Henry's credibility was clearly at issue, and it was the jury's responsibility to resolve the conflicts in the testimony and to determine which version of Henry's several stories, if any, was true. See *State v. Poellinger*, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990). They did so, and sufficient evidence supports the verdict.

By the Court. – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.